IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

SECOND APPEAL NO. 238 OF 2002

Shri Ramjan Dulekhan Mulla
(since deceased by his legal heirs)
1 Smt. Salima Ramjan Mulla & ors.... Appellant

V/s

PrabhakarRangu Mhamane ... Respondent

Shri S.P. Kadam for the appellant.

Shri Vinod V.Savaji holding for Shri P.B. Shah for the respondent.

CORAM: P.V. KAKADE, J.
DATED : 16TH SEPT., 2004

P.C.

1 This is an appeal preferred by the appellant-defendant against the order passed by the Addl. District Judge, Satara dated 31.12.2001 allowing the Civil Appeal and setting aside the judgment and order passed by the Civil Judge, Koregaon in Civil Suit No. 167 of 1990 dated 21.11.1994 whereby the suit was dismissed with costs.

2 The plaintiff came with a case that by an agreement of leave and licence dated 8.7.1985, defendant was inducted in the suit

property for a period of five years for running business on monthly licence fee of Rs.90/-. According to the plaintiff, the defendant contravened the terms and conditions of the agreement by committing default in paying the licence fee of Rs.90/- p.m. from July, 1998 onwards and illegaly constructed a shed on one portion of the suit property. Since terms of the licence expired and there was breach of conditions of the agreement, the defendant was issued with legal notice demanding possession of the premises, arrears of the licence fee. The notice was not duly complied with by the defendant and hence the suit was filed.

3 The defendant came with a case that the agreement between the parties was not of the leave and licence but it was lease and, therefore, he was tenant of the plaintiff. On such and other grounds, the suit was sought to be dismissed.

The learned Trial Judge adjudicated the dispute on merits and came to the conclusion that provisions of the Bombay Rent Act were not applicable to the property. The learned Trial Judge came to the conclusion that even though the nature of the transaction between the parties was that of leave and licence agreement, the defendant had not committed any breach of conditions of the licence and in fact he had directed to erect the shed of the plaintiff and, therefore, he

was not liable to be evicted from the property.

Being aggrieved by the said order, the plaintiff preferred appeal in the District Court, Satara. The learned Additional District Court Judge held that the plaintiff had proved that the contract between the parties was that of leave and licence and plaintiff was, therefore, entitled to possession and arrears of rent. The appeal came to be allowed. Hence the present appeal.

4 I have heard learned counsel for both parties. Perused the record.

The substantial question of law sought to be raised was to the effect that the Appellate Court ought to have appreciated that the suit filed by the respondent was bad in law for want of notice under Section 105 read with Sec.106 of the Transfer of Property Act and, as such, notice was necessary to be issued as the document Exh.53 was not a licence but a lease deed. In other words, what dispute is sought to be raised is, the interpretation of document Exh.53. In this regard, both the Courts below have held that the nature of Exh.53 is that of leave and licence and not lease. This concurrent finding is seen to be passed on available evidence on record. Moreover, it is a question of fact and, therefore, in my considered view, it cannot be raised at this stage

of second appeal as contemplated under Sec.100 of the Code of Civil Procedure.

In the case of **Kondiba Dagadu Kadam v/s Savitribai Sopan Gujar & ors., reported in A.I.R. 1999 S.C. 2213,** Supreme Court has held that conditions mentioned in Sec. 100 of the Code of Civil Procedure must be strictly fulfilled before the second appeal can be maintained and no Court has power to add or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts howsoever erroneous cannot be disturbed by the High Court in exercise of the powers under this section. The substantial question of law has to be distinguished from a substantial question of fact. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last Court of fact, being the first Appellate Court. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower Appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. Therefore, if we take into account this ratio laid down by the Supreme Court in the said case, it is obvious that finding of fact

cannot be interfered with especially when it is concurrent finding of fact recorded by the Court below. In view of this position and especially when it is seen from the record that both the Courts below have appreciated the evidence in proper manner, no interference is called for at this stage and, therefore, the appeal deserves to be dismissed and, therefore, stands dismissed in limine with no order as to costs.

Consequently, the civil application also stands dismissed with no order as to costs.

However, it is clarified that the ad-interim relief granted in the course of pendency of the appeal stands continued for six weeks.

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